No. 12029

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

TIGHE E. WOODS, Housing Expediter, Office of the Housing Expediter,

Appellant,

vs.

SALLY KAYE,

Appellee.

APPELLEE'S BRIEF.

H. MILES RASKOFF and
GENDEL & CHICHESTER,
810 Oviatt Building, Los Angeles 14,
Attorneys for Appellee.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

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To the Honorable Judges of the United States Court of Appeals for the Ninth Circuit:

Comes now Sally Kaye, appellee herein, and in reply to the appellant's opening brief, respectfully states as follows:

Summary of Argument.

Appellant, the Housing Expediter, brought an action in the Court below to enjoin violations of the Housing and Rent Act and to compel the landlord to make restitution pursuant to an order of the Area Rent Director. There are two questions presented on this appeal. First, does the District Court have the power to determine whether or not the regulation, upon which the order was based,

applies to the appellee. If the answer to this question be in the affirmative, the remaining question is whether or not the finding of the Court below that the appellee had duly filed a registration statement within 30 days of the renting of the housing accommodation was clearly erroneous. The authorities hereinafter discussed fully support the decision of the Court below, and we submit that the judgment should be affirmed on the following grounds:

1. The trial court had the power and duty to determine the applicability to appellee of the refund order and the regulation on which it was based.

2. There was substantial evidence to support the finding that appellee had duly filed a Registration Statement within 30 days after the housing accommodations were first rented.

3. This being a proceeding in equity, the trial court had the discretion to determine whether an order for restitution was necessary or proper under the circumstances, and there has been no showing that the discretion was abused in the present case.

I.

The Trial Court Had the Power and Duty to Determine the Applicability to Appellee of the Refund Order and the Regulation on Which It Was Based.

At the outset appellee desires to make it clear that she does not now, nor did she in the trial court, attack the validity of the order in so far as it established the maximum rent for the housing accommodations in question from and after the date of said order. It is the appellee's position that the retroactive provisions of the order did not and could not apply to appellee for the reason that the section of the Rent Regulation upon which the said order was expressly based did not apply to appellee. It will be noted from the order itself [Tr. 27] that it was issued May 19, 1947; after providing that the maximum rent for the housing accommodations shall be decreased, it reads:

> "For the reason stated in Section 4(e) of the Rent Regulation, the Maximum Rent so decreased and determined by this Order shall be effective from September 23, 1946."

Section 4(e) of the Rent Regulation for Housing (10 F. R. 13528) which is reprinted in the appendix to appellant's brief on page 23 thereof, provides in so far as it is here relevant:

> "If the landlord fails to file a proper registration statement within the time specified [30 days] . . . the rent received for any rental period commencing on or after the date of the first renting, or October 1, 1943, whichever is the later, shall be received subject to refund to the tenant of any amount in excess of the maximum rent which may later be fixed by an order under Section 5(c)(1)."

It should be noted that all of the rental payments here involved were made prior to the date of this order [Tr. 22].

While it is true, as appellant has pointed out, that only the Emergency Court of Appeals has jurisdiction to determine the validity of any regulation or order of the Housing Expediter, it is equally clear that only the enforcement Court can interpret and apply the order or regulation sought to be enforced. This principle as to the respective duties of the Emergency Court of Appeals and the District Courts has been recognized by this Court. Thus in *Fleming v. Dashiel* (C. C. A. 9th), 161 F. 2d 612, which is cited and quoted from on page 7 of appellant's opening brief, the Court states:

> "It is equally clear that *where an order upon its face is clearly applicable,* any failure by the district court to enforce it is in legal effect the equivalent of declaring the order invalid." (Emphasis added.)

This is a clear recognition that the District Court can properly determine the applicability of an order. Similarly in the case of *Bowles v. Wheeler* (C. C. A. 9th), 152 F. 2d 34, (cited on page 8 of appellant's brief), this Court held that the Emergency Price Control Act and the regulations thereunder applied to the defendant in that case, but in so holding the Court stated that both the District Court and the Circuit Court, on appeal, should determine the application of the Act and the Regulations to the business of defendant where the defendant in an enforcement proceeding denied their application. After stating that the Court did not have power to consider the validity and

legality of the regulation, this Court stated (152 F. 2d at 37):

> "It is, of course, the province and the duty of the court to determine for itself whether a defendant is within the coverage of the Act or Regulations, but in the determination of that question it is not competent for the court to consider the fairness or the equity of any regulation or price schedule established thereby."

In that case the Court considered the applicability of the Act and the regulations to the defendant notwithstanding the fact that the regulation there in question specifically named the business operations there involved as being subject to the regulation. This is in accord with the decisions in other circuits, in the Emergency Court of Appeals, and in the Supreme Court.

In the case of *Bowles v. Griffin* (C. C. A. 5th), 151 F. 2d 458, a landlord was sued by his tenant for overcharges in rent, the tenant relying on a rent order of the Office of Price Administration reducing the rent on the premises in question retroactively. Notwithstanding the fact that O. P. A. had issued an order directed to the landlord reducing the rent retroactively, the landlord defended on the ground that there was a prior order of O. P. A. authorizing the rental that the tenant had paid. The O. P. A. intervened in the action and made the same contention that the Housing Expediter is making in the instant case, that is that the order reducing the rent retroactively was binding upon the District Court. In ruling against the contention of the O. P. A. in that case,

the Fifth Circuit used the following language which is particularly appropriate here:

> "But the regulations and orders of the administrator are in their nature legislative and administrative and not judicial. The fact findings on which they are based do not constitute estoppel as by judgment. While the consideration of the validity of regulations and orders is reserved for the Emergency Court of Appeals, the application and enforcement of them is by Section 205 committed wholly to the district court, which has the jurisdiction to find the facts to which the regulations or orders are to be applied . . . Its [the district court's] enquiry on these points cannot be cut off and foreclosed by fact findings of the Administrator." (151 F. 2d at 460.)

The Court of Appeals for the District of Columbia reached a similar result in *In re Rice,* 165 F. 2d 617. In that case the Office of Price Administration had issued an order expressly purporting to cover the price to be charged for the rental of taxi cabs. Rice, the owner of taxi cabs who rented them to others for operation in the District of Columbia, appealed from an order of the District Court for the District of Columbia directing Rice to obey an administrative subpoena. The Court of Appeals reversed the order of the District Court on the ground that Rice was not subject to the Price Control Act, the Court stating at 165 F. 2d 620:

> "We are here considering, however, not the validity of Regulation 571, but the coverage of the Price Control Act itself; for in the absence of coverage, the Regulation could not apply. It is one thing to invalidate a price regulation; that may be done only by the Emergency Court. It is quite a different thing to decide that a price regulation, valid when applic-

able, does not apply to an appellant who is a common carrier within the exemption of the statute. The latter action is, strictly speaking, not an invalidation of the regulation, but a determination that, because of the statutory exemption, the act does not cover the particular situation under consideration. *Farmers' Gin. Co. v. Hayes,* D. C., 54 F. Supp. 47, 55; *Bowles v. Nu Way Laundry Co.,* 10 Cir., 144 F. (2d) 741, 746, certiorari denied, 1945, 323 U. S. 791, 65 S. Ct., 431, 89 L. Ed. 631; *Bowles v. Wheeler,* 9 Cir., 152 F. (2d) 34, 37, certiorari denied, 1945, 326 U. S. 775, 66 S. Ct. 265, 90 L. Ed. 468."

The Emergency Court of Appeals has consistently held that only the enforcement court, that is the District Court, has the power to determine the interpretation or application of any order or regulation of the Housing Expediter and that the Emergency Court will not make such a determination unless it is necessary for a consideration of the validity of the order or regulation complained of.

Gordon v. Bowles, 153 F. 2d 614;
Collins v. Bowles, 152 F. 2d 760;
Conklin Pen Co. v. Bowles, 152 F. 2d 764;
Alan Levin Foundation v. Bowles, 152 F. 2d 467;
Chippewa County Co-Op. Dairy v. Clark, 163 F. 2d 753.

In the *Gordon* case first cited above, the complainant was seeking to have the validity of a certain price regulation and order determined. The complainant contended that the administrator erroneously included complainant in a certain category of retailers defined by the order and that in fact the complainant should have been included in another category. The Emergency Court of Appeals dismissed the complaint on the ground that the Emergency

Court of Appeals had no jurisdiction to determine the propriety of the classification complained of. In so holding the Court states (153 F. 2d at 615):

> "In discussing this contention, we should bear in mind that with the propriety of complainant's classification as such, involving, as it does, interpretation and application of the regulations to him, this court is not concerned. Those questions are left to the district court for determination in enforcement or declaratory action. (Citing cases.)"

The opinion is concluded as follows (153 F. 2d at 616):

> "The propriety of the classification as a matter of fact and the interpretation of the regulation are questions for the enforcement court; as to them we refrain from gratuitous expression of opinion."

The foregoing line of cases of the Emergency Court of Appeals has been approved by the United States Supreme Court. *Holland v. Porter* (1946), 328 U. S. 46, 66 Fed. Ct. 893.

On the basis of the foregoing authorities it seems clear that in the instant case the trial court, before enforcing the order, had the duty to determine whether or not the regulation, upon which it was on the face thereof expressly based, applied to the defendant. The applicability of that regulation depended upon a finding of fact as to whether or not the defendant had filed a Registration Statement within 30 days after the first renting of the housing accommodations in question. The Court found, and as we shall hereinafter demonstrate, upon substantial evidence that a registration was filed within 30 days after the first renting of the housing accommodations, and it therefore followed that the regulation authorizing a retroactive order was inapplicable to appellee.

II.

There Was Substantial Evidence to Support the Finding That Appellee Had Duly Filed a Registration Statement Within 30 Days After the Housing Accommodations Were First Rented.

The Court below found as a fact [Tr. 23] that "within 30 days after the said housing accommodations were first rented, to-wit, on or about the 20th day of October, 1496, the defendant, Sally Kaye, duly filed, in triplicate, a written statement on the form provided therefor, known as a registration statement, identifying the said housing accommodations and specifying a maximum rent therefor in the sum of One Hundred Fifty ($150) dollars." No citation of authority is necessary for the well established principle that findings of fact shall not be set aside unless clearly erroneous. Before calling attention to the evidence in the record supporting the above quoted finding we should like to make it clear that we are in full accord with the legal principles set forth on pages 12 to 16 of appellant's opening brief to the effect that the word "file" means received and not mailed. The Court below, however, found as a fact that the registration statement was filed and it is appellee's position that the evidence fully supports this finding.

It is undisputed that the premises were first rented on the date of the lease [Tr. 28] September 23, 1946. Appellee testified that on the 15th of October, 1946, she wrote a letter addressed to the O. P. A., Santa Ana, California, requesting a supply of registration blanks; that two days later she received from O. P. A. a set of registration forms and that on the same day she filled out the forms and returned them to the Office of Price Administration [Tr. 72, 73]. Appellee further testified that the informa-

tion contained on Plaintiff's Exhibit 1 [Tr. 27] which was the second registration statement filed by the appellee on February 21, 1947, was copied from a copy of the original registration which she had mailed to O. P. A. on October 20, 1946. On cross-examination appellee further testified in this connection that the original registration above referred to was mailed in an envelope addressed to O. P. A., Santa Ana, California [Tr. 84]. The only evidence in the entire record which can possibly be construed to be in conflict with the foregoing testimony of appellee is that the appellant's file did not contain a registration earlier than the registration introduced in evidence as Plaintiff's Exhibit 1 [Tr. 62].

The foregoing evidence substantially supports the finding that the registration had been filed or received. As stated by the United States Supreme Court in *Rosenthal v. Walker* (1883), 111 U. S. 185, 193, 4 S. Ct. 382:

> "The rule is well settled that if a letter properly directed is either proved to have been put into the post office or delivered to the postman, it is presumed, from the known course of business in the post office department, that it reached its destination at the regular time, *and was received by the person to whom it was addressed.* (Citing cases.) As was said by Gray, J. in the case last cited [*Huntley v. Whittier,* 105 Mass. 391], 'the presumption so arising is not a conclusive presumption of law, but a mere inference of fact founded on the probability that the officers of the government will do their duty, in the usual course of business, and when it is opposed by evidence that the letters never were received it must be weighed with all other circumstances of the case, by the jury in determining the question whether the letters were actually delivered or not.' "

Accord:

Columbian Nat'l Life Ins. Co. v. Rodgers (C. C. A. 10th), 93 F. 2d 740;

Atlantic Dredging & Construction Co. v. Nashville Bridge Co. (C. C. A. 5th), 57 F. 2d 519;

Hand & Johnson Tug Line v. Canada Steamship Line (C. C. A. 6th), 281 Fed. 797;

Weniger v. Success Mining Co. (C. C. A. 8th), 227 Fed. 548.

See also Subsection 24 of Section 1693 of the Code of Civil Procedure of the State of California.

A recent decision of the Court of Appeals for the Tenth Circuit forcefully illustrates this principle. That case is *Crude Oil Corp. v. Commissioner of Internal Revenue,* 161 F. 2d 809, which was a petition to review a decision of the Tax Court against the taxpayer. The sole issue in that case was whether or not the taxpayer had "filed" before a certain date a capital stock tax return. The taxpayer presented evidence that the returns were enclosed in an envelope properly addressed and the envelope was deposited in the United States Mail in sufficient time to have been received by the Collector within the statutory filing period. The Commissioner introduced evidence as to the usual manner of handling mail received by the Collector's office in question. The Tax Court ruled against the taxpayer not on the ground that the return was not filed within the statutory period, but merely on the ground that the presumption of delivery was insufficient to over-

come the presumption of correctness of the commissioner's determination. In reversing the Tax Court the Court of Appeals for the Tenth Circuit states:

> "We think the Tax Court fell into an error of law. The presumption of the correctness of the Commissioner's finding is one of law. It is not an inference of fact. It disappears when evidence, sufficient to sustain a contrary finding, has been introduced.
>
> "When mail matter is properly addressed and deposited in the United States Mail, with postage duly prepaid thereon, there is rebuttable presumption of fact that it was received by the addressee in the ordinary course of mail.
>
> "The presumption of receipt is a strong one. A finding in opposition to such inference of fact, absent evidence of non-receipt, is against the weight of the evidence.
>
> "Proof of due mailing is *prima facie* evidence of receipt.
>
> "It follows that the proof of regular mailing, in time to reach the Collector, in due course of mail, within the statutory filing period, was sufficient to support a finding that the return was timely filed; that the presumption of correctness attached to the Commissioner's finding vanished; and that the issue was for decision wholly on the evidence." (161 F. 2d at 810.)

Since the finding of the Court below that the registration was "duly filed" was supported by substantial evidence, we respectfully submit that the finding is binding on this Court.

III.

This Being a Proceeding in Equity, the Trial Court Had the Discretion to Determine Whether an Order for Restitution Was Necessary or Proper Under the Circumstances, and There Has Been No Showing That the Discretion Was Abused in the Present Case.

On page 19 of appellant's opening brief, reference is made to the decision of the Supreme Court in *Porter v. Warner Holding Company,* 328 U. S. 395. The quotation from the opinion of the Supreme Court as contained in appellant's brief demonstrates that an enforcement action in which the Housing Expediter seeks to enjoin a violation of the rent regulation and to compel the landlord to make restitution is directed to the equity side of the Court. The opinion of the Supreme Court goes on to state (328 U. S. at 403):

> "It follows that the District Court erred in declining, for jurisdictional reasons, to consider whether a restitution order was necessary or proper under the circumstances here present. The case must therefore be remanded to that Court so that it may exercise the discretion that belongs to it. If the Court decides to issue a restitution order and should there appear to be conflicting claims and counter-claims between tenants and landlord as to the amounts due, the Court has inherent power to bring in all the interested parties and settle the controversies or to retain the case until matters are otherwise litigated."

Independently of the grounds hereinabove stated for affirmance of the judgment below, it seems clear from the record in this case that the trial court duly considered the necessity or propriety under the circumstances of this

case for an order of restitution and for an injunction. Thus the landlord [Tr. 70 to 87] and tenant [Tr. 63 to 70] were before the Court, and evidence as to conflicting claims between them was introduced [Tr. 83]. After hearing all the evidence the Court stated [Tr. 98] "and I may say that this is another one of the cases where the persons occupying the premises conclude to enrich themselves at the expense of the landlord, and I do not approve of that."

Conclusion.

On the basis of the foregoing authorities and the record in this case, the judgment below should be affirmed.

Respectfully submitted,

H. Miles Raskoff and
Gendel & Chichester,
Attorneys for Appellee.